

Police Witness Immunity Under § 1983

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In the 1983 decision *Briscoe v LaHue*,¹ the Supreme Court ruled that a policeman who testifies falsely and even maliciously at trial may not later be sued under § 1983² for damage caused by his testimony. The Court's decision involved several considerations, but rested chiefly on the principle that

"the tort liability created by § 1983 cannot be understood in a historical vacuum. . . . One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary."³

When § 1983 was drafted in 1871, the Court continued, "[t]he immunity [at common law] of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established"⁴ Modern courts entertaining suits under § 1983 must recognize this same immunity, the Court maintained, and consequently an officer may not be made to answer under § 1983 for his lies at trial.

Briscoe ratified the view of trial witness immunity already pre-

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¹ 460 US 325 (1983).

² 42 USC § 1983 (1982) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

A lying witness will of course be subject to prosecution for perjury, and in addition to § 1983, state remedies may be available to recompense victims of perjurious conduct. This Comment assumes that § 1983 has been properly invoked.

³ *Briscoe*, 460 US at 330, quoting *City of Newport v Fact Concerts, Inc.*, 453 US 247, 258 (1981).

⁴ *Briscoe*, 460 US at 330-31.

vailing in the majority of circuit courts.⁵ Nonetheless, the decision has only partly cleared the confusion regarding police witness immunity, since lower courts must still decide how far the rule extends: If trial testimony is protected, is grand jury testimony immunized too? What about testimony at preliminary and probable cause hearings, or statements made in affidavits and complaints?

The Court expressly reserved these questions in *Briscoe*,⁶ and since then the lower courts have split on nearly all.⁷ Compounding the resultant disarray is the fact that before courts can answer these questions intelligently, they will have to decide how to handle this fundamental and somewhat embarrassing problem: the Supreme Court got the law wrong.

The absolute "immunity . . . from subsequent damages liability" the Court found in *Briscoe* was indeed "well established" in 1871. It was also astonishingly far reaching. It was not limited to trial testimony, nor was it purely a "witness immunity"; rather, it was an immunity from suit for anything said or written in the course of any judicial proceeding.⁸ Affidavits and written complaints were covered by the rule; testimony before grand juries was covered; even a complaint made to a justice of the peace was considered by courts and commentators to be an "absolutely privileged communication."⁹

⁵ The Court noted in *Briscoe* that "[a] rule of absolute immunity has been adopted by the majority of Courts of Appeals," citing five cases in five different circuits. 460 US at 328 n 4. *Briscoe* itself, which originated in the Seventh Circuit, made six. The Sixth and DC Circuits were identified as rejecting absolute immunity. *Id.*

⁶ *Id.* at 329 n 5.

⁷ Absolute immunity granted grand jury witness, *Briggs v Goodwin*, 712 F2d 1444, 1448 (DC Cir 1983); *Macko v Byron*, 760 F2d 95, 97 (6th Cir 1985); *Kincaid v Eberle*, 712 F2d 1023 (7th Cir 1983); *Strength v Hubert*, 854 F2d 421 (11th Cir 1988) (though remanding in recognition that acts prior to grand jury testimony might constitute malicious prosecution violative of § 1983). Absolute immunity granted witness in probable cause hearing, *Williams v Hepting*, 844 F2d 138, 143 (3d Cir 1988); in preliminary hearing, *Holt v Castaneda*, 832 F2d 123, 127 (9th Cir 1987); for warrant affidavit, *Collins v Walden*, 613 F Supp 1306, 1314 (N D Ga 1985), *aff'd*, 784 F2d 402 (11th Cir 1986); for allegations in criminal complaint, *Wickstrom v Ebert*, 585 F Supp 924, 934 (E D Wis 1984).

Absolute immunity denied grand jury witness, *White v Frank*, 855 F2d 956, 961 (2d Cir 1988); *Anthony v Baker*, 767 F2d 657, 662-63 (10th Cir 1985). Absolute immunity denied witness in probable cause hearing, *Wheeler v Cosden Oil and Chemical Co.*, 734 F2d 254, 261 (5th Cir 1984); for warrant affidavit, *Krohn v United States*, 742 F2d 24, 31 (1st Cir 1984).

⁸ See text at notes 38-42.

⁹ We are more familiar with the term "privileged communication" denominating confidences inadmissible at trial. In some jurisdictions, for example, grand jury testimony is privileged in this sense as well, though exceptions commonly are made for malicious prosecution suits arising from such testimony. At common law the term was used to designate secret testimony as well as testimony from which a suit could not arise, and this Comment uses the

All this, however, was the law within the realm of slander and libel.¹⁰ These actions were not the sole recourse for one who was falsely accused, just as they are not the sole recourse today. To nineteenth century courts, falsely and maliciously bending the judicial machinery to the prosecution of another was grave enough to constitute a discrete action: the action for malicious prosecution. And just as a formidable body of case law supports witnesses' immunity from suit for defamation, scores of common law cases hold witnesses liable for false statements leading to an unwarranted prosecution. The *Briscoe* majority proceeded as if unaware of this other, parallel body of case law concerning false testimony in judicial proceedings, and the lower courts consistently have replicated this error in dealing with statements made in grand jury proceedings, preliminary hearings, and affidavits.

This Comment examines the recent treatment of § 1983 police witness immunity in the federal courts, beginning with a close look at *Briscoe v LaHue*, which remains the leading decision in the area. Section II turns to the law surrounding witness immunity in 1871, the year § 1983 was drafted and the year the Supreme Court has said must shape § 1983 immunity today. Two distinct but interlocking bodies of case law emerge, one conferring absolute witness immunity from the earliest stages of criminal prosecution, the other establishing liability from those same early stages. Section III examines the common law of witness immunity in the context of current federal practice and illustrates a fundamental error that regularly afflicts federal court decisions involving witness immunity. Finally, section IV discusses two important decisions¹¹ that point the way to an accurate and balanced resolution of the confusion presently surrounding § 1983 police witness immunity.

I. A CLOSER LOOK AT *BRISCOE*

Briscoe v LaHue came to the Supreme Court from the Seventh Circuit, which had consolidated three cases that it believed presented a single question of witness immunity. In *Briscoe* itself, officer Martin LaHue had been accused of testifying, falsely, that a fingerprint lifted from a burglary site belonged to Carlisle Briscoe. He gave this testimony "at several judicial proceedings in the course of a state prosecution against Briscoe";¹² two of the pro-

term only in the latter sense.

¹⁰ For convenience, this Comment uses "defamation" to designate both of these actions.

¹¹ *Malley v Briggs*, 475 US 335 (1986), and *White v Frank*, 855 F2d 956 (2d Cir 1988).

¹² *Briscoe v LaHue*, 663 F2d 713, 715 (7th Cir 1981) (emphasis added).

ceedings were probable cause hearings, one of which led to Briscoe's arrest.¹³ In the other actions consolidated with *Briscoe*—*Talley v Crosson* and *Vickers v Hunley*—counts against police officers were limited to lying at trial.¹⁴

The Seventh Circuit had begun its opinion in *Briscoe* by noting that "[t]he common thread in these cases is the question whether police officers can be sued under § 1983 for testifying falsely in *criminal proceedings*."¹⁵ When the case was presented to the Supreme Court, however, the issues had been narrowed. Justice Stevens began his opinion by stating that the case presented one question: "whether 42 U.S.C. § 1983 . . . authorizes a convicted person to assert a claim for damages against a police officer for giving perjured testimony at his *criminal trial*."¹⁶

In answering this question, the Court began by examining the potential liability of lay witnesses under § 1983. Lay witnesses, the Court posited, would be immune for two reasons. First, they do not act under color of state law. Second, § 1983 must be applied in light of common-law immunities existing at the time the statute was drafted, and in 1871 lay witnesses were absolutely immune from suit for damages arising from their testimony.¹⁷

The Court then moved from lay witnesses to an exposition of recent decisions in which it had found § 1983 immunity for "judges and prosecutors who perform integral functions in judicial proceedings"¹⁸ The focus of the Court's analysis in these cases was the "nature of the judicial proceeding itself"¹⁹: "Absolute immunity is [] necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation."²⁰ "In short," the Court concluded,

the common law provided absolute immunity from subsequent damages liability for all persons—governmental or otherwise—who were integral parts of the judicial process. . . . When a police officer appears as a witness, he may reasonably

¹³ *Briscoe*, 460 US at 350 (Marshall dissenting).

¹⁴ *Briscoe*, 663 F2d at 716, 717.

¹⁵ *Id* at 715 (emphasis added).

¹⁶ *Briscoe*, 460 US at 326 (emphasis added).

¹⁷ *Id* at 329-34.

¹⁸ *Id* at 329. Among the decisions mentioned are *Pierson v Ray*, 386 US 547 (1967) (holding state judges absolutely immune for their judicial acts) and *Imbler v Pachtman*, 424 US 409 (1976) (holding state prosecutors absolutely immune for actions in initiating prosecutions). *Briscoe*, 460 US at 334.

¹⁹ *Briscoe*, 460 US at 334.

²⁰ *Id* at 335, quoting *Butz v Economou*, 438 US 478, 512 (1978).

be viewed as acting like any other witness sworn to tell the truth—in which event he can make a strong claim to witness immunity²¹

In an elliptic aside that furnished no basis for its eventual decision, but—we will see below—bore important implications, the Court added:

[A]lternatively, [the officer] may be regarded as an official performing a critical role in the judicial process, in which event he may seek the benefit afforded to other governmental participants in the same proceeding.²²

Having concluded that § 1983 was drafted against a common law background of absolute immunity for lay witnesses, the Court inquired whether anything in the statute's legislative history indicated that Congress had intended to abrogate this particular common-law immunity. No such intent was found.²³ The Court then addressed the plaintiffs' policy arguments for treating police officers differently from other witnesses.²⁴ Granting that the plaintiffs' distinctions between lay witnesses and police officers "have some force," the Justices rejected them nonetheless. First, the Court reiterated that "immunity analysis rests on functional categories, not on the status of the defendant."²⁵ That is, the determinative factor was the police officer's function as a witness, not his status as a policeman. Second, the Court indicated that although the differences between police and lay witnesses provide some arguments for lifting absolute witness immunity, those differences also give rise to other, countervailing "considerations of public pol-

²¹ *Briscoe*, 460 US at 335-36.

²² *Id.* at 336. See text at note 101.

²³ The plaintiffs had argued that § 1983's drafters, concerned largely with perjury by Ku Klux Klan members, would have wanted to discourage perjury by all means possible and consequently would have disfavored absolute immunity for witnesses. *Id.* Granting that KKK perjury was a concern at the time, the Court rejected the plaintiffs' argument on the grounds that the drafters of § 1983 had been "concerned with perjury resulting in unjust acquittals . . . and not with perjury . . . that might lead to unjust convictions." *Id.* at 339-40 (emphasis in original).

²⁴ See *id.* at 341-42. The plaintiffs had argued that one justification for witness immunity—that without immunity witnesses would not come forward—is mitigated by the fact that policemen often are duty-bound to testify about their investigations. Second, any concern that even those police officers who appeared would skew their testimony to mollify the defendants is mitigated by the officers' professional interest in conviction. Finally, the plaintiffs urged that because a policeman is an especially convincing witness before a jury, there is a special need to keep him honest.

²⁵ *Id.* at 342.

icy" that urge retention of immunity.²⁶ For example, police officers testify frequently, and if permitted § 1983 suits based on testimony would become legion, undermining "not only [police officers'] contribution to the judicial process but also the effective performance of their other public duties."²⁷

The Court concluded *Briscoe* with a succinct reaffirmation of the principal basis of its decision:

In short, the rationale of our prior absolute immunity cases governs the disposition of this case. In 1871, common-law immunity for witnesses was well settled. The principles set forth in *Pierson v. Ray* to protect judges and in *Imbler v. Pachtman* to protect prosecutors also apply to witnesses, who perform a somewhat different function in the trial process but whose participation in bringing the litigation to a just—or possibly unjust—conclusion is equally indispensable.²⁸

Justice Marshall wrote a long and scholarly dissent in *Briscoe*, disputing the majority's analysis at nearly every turn. For this Comment, it will suffice to note only his discussion of common-law witness immunity. The majority, Marshall argued, had looked exclusively to the law of defamation. Yet *Briscoe's* complaint had alleged deprivation of constitutional rights not just in LaHue's trial testimony, but in statements made in "two probable cause hearings, one of which resulted in *Briscoe's* arrest."²⁹ "[A]t common law," Marshall explained, "such an allegation would have formed the basis of an action on the case for malicious prosecution," and courts "routinely" allowed claims against defendants who "had made a false and malicious accusation of a felony to a magistrate or other judicial officer."³⁰

As we will see, Justice Marshall's depiction of the common law was correct, as was his characterization of the case before the Court. Nonetheless, his dissent was largely ignored by the majority, and his reference to the majority's concentration on the law of defamation to the exclusion of the action for malicious prosecution was waved away in this not-so-helpful footnote:

The availability of a common-law action for false accusations

²⁶ Id at 343.

²⁷ Id.

²⁸ Id at 345-46.

²⁹ Id at 350 (Marshall dissenting).

³⁰ Id at 350-51 (Marshall dissenting). Marshall also argued—less convincingly—that even the Court's representation of immunity from suit for defamation was inaccurate. Id at 352-55.

of crime . . . is inapposite because petitioners present only the question of § 1983 liability for false testimony during a state-court criminal trial.³¹

II. WITNESS LIABILITY AND THE COMMON LAW IN 1871

A. Immunity from Suit for Defamation

The absolute immunity³² of witnesses from suit for slander or libel was a feature of Anglo-American law well before the passage of § 1983. The common law judges' justifications for witness immunity differ little from those the courts give today. "The origin of the rule was the great mischief that would result if witnesses in Courts of justice were not at liberty to speak freely," explained one judge on a panel of the Exchequer in the mid-nineteenth century.³³ He elaborated:

In spite of all that can be said against it, we find the rule acted upon from the earliest times. The mischief would be immense if the person aggrieved, instead of preferring an indictment for perjury, could turn this complaint into a civil action.³⁴

Similarly, a much-quoted American case had it that

the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible.³⁵

³¹ *Briscoe*, 460 US at 330-31 n 9. As noted above, *Briscoe* had been narrowed to the issue of liability for trial testimony by the time it reached the Supreme Court, but its facts, its resolution by the Seventh Circuit, and its implications for lower courts upon announcement were much broader. See text at notes 15 and 66-67.

³² Some nineteenth-century cases describe witness immunity as qualified, depending on the witness's good faith. See, for example, *Briggs v Byrd*, 34 NC 353, 355-56 (1851). The Supreme Court was largely correct in *Briscoe*, however, when it noted that "good faith" in those cases tended to be established by showing the pertinence of the statement to the proceeding, which in American courts generally was a requirement to claiming witness immunity. *Briscoe*, 460 US at 331-32 n 11. See discussion in note 35. Moreover, cases holding immunity to be absolute far outnumber those mentioning a qualified immunity, and contemporary treatises—the surest guide to the law at the time—leave little doubt as to the dominant rule. See John Townshend, *A Treatise on the Wrongs Called Slander and Libel* § 220 at 347-48 (Baker, Voorhis, 2d ed 1872); Henry Coleman Folkard, ed, *Starkie's Treatise on the Law of Slander and Libel* 209 (Butterworths, 3d ed 1869).

³³ *Henderson v Broomhead*, 157 Eng Rep 964, 968 (Ex 1859) (Crompton).

³⁴ *Id* at 968.

³⁵ *Calkins v Sumner*, 13 Wis 215, 220 (1860). As this quotation makes explicit, the "fear of coming forward" explanation for witness immunity is rooted in public policy. Notions of

In *Briscoe*, the Supreme Court adduced two "obstructions" to truth that might arise from permitting suit against witnesses: first, witnesses might be reluctant to come forward; and second, even when they did take the stand, they might trim their testimony to avoid provoking the defendant to bring suit.³⁶

In *Briscoe* and elsewhere, this immunity is routinely referred to as "witness immunity," but it has never been limited to testimony delivered from the stand. This follows logically from the rule's purpose, since a policy not to discourage the production of evidence must protect not only trial testimony, but any evidence that might lead to the "ascertainment of the truth," including—indeed, especially—evidence leading to the commencement of a legal action. In fact, the early cases finding witness immunity deal with initiation of criminal prosecution perhaps more than any other stage of the judicial process. In one of the first applications of immunity (and one of the first cases cited by the Supreme Court in *Briscoe*) Lord Coke held that immunity barred a libel action for "prosecuting a matter against another," explaining that if such actions are permitted "men shall be terrified from proceeding in the legal course of justice against another"³⁷

The depth³⁸ of witness immunity in 1871 is apparent from a number of contemporary sources. In a treatise published in 1872, John Townshend begins his exemplification of the immunity cover-

individual culpability, however, doubtless also contributed to the development of the rule. Witnesses often speak not of their own initiative, but in response to questions from the bar (or subpoenas from the bench). It hardly seems just to hold one liable for an answer that he genuinely felt compelled to give. And for this reason, as early as the sixteenth century—well before the development of the modern system of defenses and immunities—uttering words in a judicial proceeding seems to have provided a defense to an action for slander by means of a "special traverse." See R.H. Helmholz, *Civil Trials and the Limits of Responsible Speech*, in *Juries, Libel, and Justice* 12 (Castle Press, 1984). See also *M'Millan v Birch*, 1 Binn 178, 186 (Pa 1806), in which the judge explained that "[t]he occasion of my speaking being called upon by others . . . preclude[s] the idea of malice" which the law imputes to the words. The influence of this reasoning is further evidenced by the pertinence requirement to witness immunity, which provided that the words spoken must be pertinent to the proceeding for immunity to obtain. If they were not pertinent, they were not "called for," and the imputation of malice was not negated. This is commonly described as the "American rule," but see William Blackstone, 3 *Commentaries on the Laws of England* 125 (U Chicago, 1979).

³⁶ 460 US at 333.

³⁷ *Anfield v Feverhill*, 80 Eng Rep 1113 (KB 1614), cited in *Briscoe*, 460 US at 331.

³⁸ The "depth" of immunity is used in this Comment to refer to the stages of judicial proceedings that the immunity covers; a "deep" immunity is one that covers not just trial testimony, but grand jury proceedings, preliminary hearings, and other pre-trial proceedings. The "breadth" of immunity refers to the number of actions covered: a "broad" immunity protects a witness from many different actions.

ing "defamatory matter published in or to a court of criminal jurisdiction" with a case in which the statement in question, ultimately held to be privileged, was made to a justice of the peace in demand of a warrant against a neighbor for theft.³⁹ The treatise cites with approval the court's reasoning that, if such actions were allowed, "no other would come to a justice of the peace to inform him of a felony."⁴⁰ Indeed, Townshend's discussion of the privilege accorded judicial proceedings begins with complaints, then treats pleadings in civil proceedings, affidavits, and, finally, testimony under oath.⁴¹ Innumerable cases evince the same rule.⁴²

B. Liability for Malicious Prosecution

Witness immunity sprang from a commonsensical concern for the administration of justice: if people were civilly liable for mistakenly reporting suspicion of crime, law enforcement would be stifled. An equally important feature of eighteenth-century tort law, however, was the action for malicious prosecution, which also was rooted in a sensible concern for the integrity of the judicial process: false prosecutions waste judicial resources and tarnish the image of justice, and a person maliciously prosecuted by another should, if vindicated, have some remedy for his troubles. Penalties for falsely accusing another existed in Anglo-Saxon times,⁴³ and civil remedies for those unjustly accused may have existed by the early thirteenth century.⁴⁴ By 1285, it was provided by statute that those who "through Malice . . . procure false appeals" against others may be compelled to "restore to the Parties appealed their Damages . . . having respect to the Imprisonment or Arrestment that the Party appealed hath sustained . . . and to the Infamy that they have incurred by the Imprisonment. . . ."⁴⁵ In the late nineteenth century the action for malicious prosecution still aimed to make whole the injuries this statute identified, which were de-

³⁹ Townshend, *Treatise* § 220 at 347 (cited in note 32).

⁴⁰ *Id.* at 348.

⁴¹ *Id.* §§ 220-23.

⁴² Immunity for grand jury testimony, *Kidder v Parkhurst*, 3 Allen 393, 396 (Mass 1862); immunity for affidavit, *Garr v Selden*, 4 NY App 91, 95 (1850); immunity for criminal complaint, *Hartsock v Reddick*, 6 Blkfrd 255, 256 (Ind 1842).

⁴³ See Percy Henry Winfield, *The History of Conspiracy and Abuse of Legal Procedure* 4 (Cambridge, 1921), which also provides an illuminating discussion of early attempts to balance the state's desire to deter false accusations against its interest in encouraging true ones.

⁴⁴ *Id.* at 5.

⁴⁵ 13 Ed I (St West II) c 12, quoted in *id.* at 6.

scribed as threefold: damage to reputation, damage to the person by imprisonment, and damage to one's property by the expense of making a legal defense.⁴⁶

Four requirements for a successful action for malicious prosecution also date from fairly early on: the defendant must have helped initiate or continue the prosecution,⁴⁷ he must have done so with malice and without probable cause, and the prior action must have ended in the plaintiff's favor.⁴⁸ The burden of proving all these elements lay on the plaintiff, making malicious prosecution a notoriously difficult action to maintain. This difficulty was intended. As one nineteenth-century treatise noted, such suits were "not . . . favored in law, as they have a tendency to deter men who know of breaches of the law from prosecuting offenders, thereby endangering the order and peace of the community."⁴⁹

C. The Cooperation of the Rules

The discussion above exposes an undeniable tension between witness immunity and the action for malicious prosecution. As a matter of law, an action for defamation cannot lie for an utterance in a judicial proceeding; yet it is for this very same reason—because the utterance was made in a judicial proceeding—that an action for malicious prosecution *will* lie. "Criminal complaints must be fostered, even at the price of false and malicious accusations," proclaims the witness immunity rule. "False and malicious accusations will not be tolerated," declares the action for malicious prosecution.

Yet the two rules were hardly the proverbial ships in the night. Rather, by the time § 1983 was drafted in 1871, courts and

⁴⁶ See Lord Holt's account, excerpted in Fowler V. Harper, *Malicious Prosecution, False Imprisonment and Defamation*, 15 Tex L Rev 157, 160 (1937).

⁴⁷ That is, the defendant need not have been the "prosecutor of record" to be held liable for malicious prosecution. For example, if he did not make the original complaint, but by testifying before a grand jury or in a preliminary hearing he materially and maliciously advanced the prosecution, he would still be liable. See *Stansbury v Fogle*, 37 Md 369, 383-84 (1872). The modern rule remains the same. See "Malicious Prosecution," in 54 *Corpus Juris Secundum* § 18 (West, 1987); Restatement (Second) of Torts § 655 (1977). False testimony at trial alone would not support the action.

⁴⁸ See *Stansbury*, 37 Md 369.

⁴⁹ Martin L. Newell, *Malicious Prosecution* 21-22 (Callaghan, 1892). One contemporary court observed:

It has always been held that actions of this kind [for malicious prosecution] are not to be favored. And "the *onus probandi* is upon the plaintiff to prove affirmatively, by circumstances or otherwise, that the defendants had no ground for commencing the prosecution."

Kidder v Parkhurst, 3 Allen at 396. See also Harper, 15 Tex L Rev 157 (cited in note 46).

commentators were familiar with both rules and the lines demarcating them. Indeed, that very year a treatise was published offering this discussion in a section entitled "Of the Defences to an Action for Slander or Libel":

"The rule [for actions for libel and slander] is known to be different where the communication made or caused, is in itself the institution of a *judicial inquiry*. There, if it be apparently pertinent, it is absolutely exempt from the legal imputation of *slander*; and the party injured is turned round to a different remedy, an action for *malicious prosecution*; wherein he is bound to prove in the first instance, not merely that the communication was made in bad faith; but that it was not countenanced by probable cause. Such is the familiar instance of a criminal complaint addressed to a judicial magistrate or a grand jury, which results in a warrant or an indictment."⁵⁰

A similar discussion is found in another treatise, identified in 1871 as a "a recent and valuable" work⁵¹ and cited by the Supreme Court in *Briscoe*:⁵²

Defamatory matter published in or to a court of criminal jurisdiction may constitute the wrong called '*malicious prosecution*,' but never, it would seem, the wrong called slander or libel.⁵³

The treatises' descriptions of the interrelation of defamation and malicious prosecution mirror the rule stated in several leading cases of the time.⁵⁴

⁵⁰ *Howard v Thompson*, 21 Wend 320 (NY 1839), excerpted in J.I. Clark Hare and H.B. Wallace, *American Leading Cases* 177 (T & J Johnson, 5th ed 1871) (emphasis in original).

⁵¹ *Joseph Ruohs v Catharine Backer's next friend*, 6 Heis 395, 404 (Tenn 1871).

⁵² *Briscoe*, 460 US at 331 n 11.

⁵³ Townshend, *Treatise* § 220 at 347 (cited in note 32) (emphasis in original). See also Folkard, *Starkie's Treatise* at 209 (cited in note 32):

And in criminal prosecutions, it seems to be perfectly well established, that no action will lie for any distinct matter disclosed in the course of such a proceeding; but that the party must seek his remedy by action for a malicious prosecution

⁵⁴ In *Kidder v Parkhurst*, 3 Allen 393, the Massachusetts Supreme Court considered a three-count complaint stemming from false grand jury testimony. The court entertained but rejected a charge of malicious prosecution (probable cause was found), and in this single succinct paragraph dismissed two counts for libel:

The second and third counts in the plaintiff's declaration are for a libel on her in a complaint made by the defendants against her for perjury. The bill of exceptions shows that this complaint was made to the grand jury. It therefore appears to have been made in the regular course of justice. And the decisions, ancient and modern, are uniform, that no proceeding in a regular course of justice is to be deemed an actionable libel.

Clearly then, in 1871 the rule of witness immunity and the action for malicious prosecution were not unknown to one another. In fact, a closer look shows that there is much to their relationship that was not accidental at all. There is, first, a simple matter of timing. The tort of malicious prosecution will not lie until a warrant has been issued; an action for defamation, on the other hand, lies exactly *until* the warrant is issued.⁵⁵ Thus, in an important way the two actions do not conflict in the least; instead, the baton is passed from one action to the next, from defamation to malicious prosecution.

This symbiosis suggests a second and deeper way in which the two rules are correlate rather than contrary. Indeed, in an early article the noted tort scholar Fowler Harper seized upon the relationship between malicious prosecution and defamation (and false imprisonment) as a sort of vindication of the coherence of the entire body of tort law.⁵⁶ "The remark has occasionally been made," Harper began, "that there is nothing that can accurately be called a 'law of tort' in the sense of a systematic and logically coherent body of legal principles which disclose a consistent policy"⁵⁷ But in fact, he continued, the actions for defamation, malicious prosecution, and false imprisonment

are, in the main and for the most part in minute detail, rationally consistent and practically effective to enforce a policy that is uniform In some respects, these rules overlap, but do so with amazing accuracy; in other respects, they are com-

Id at 396.

In *Perkins v Mitchell*, 31 Barb 461, 468 (NY 1860), the New York Court of Appeals noted:

[A] person who institutes a groundless proceeding, whether civil or criminal, against another, upon false or defamatory charges, is liable to an action for the injury he occasions. But that the action must be for the malicious complaint, indictment or action, and not for the words.

⁵⁵ See Hare and Wallace, *American Leading Cases* at 216-17 (cited in note 50) ("The distinction between these two kinds of action [malicious prosecution and defamation] seems to be that an action for slander or libel will not lie wherever the other can be applied; accordingly, if a charge of felony has been made before a magistrate, and a warrant has not thereupon been issued by him, slander is the only appropriate remedy . . . ; but wherever a warrant has been issued, slander is no longer appropriate, but the action must be for malicious prosecution, or malicious arrest, or maliciously suing out a warrant."); *Perkins v Mitchell*, 31 Barb at 472 ("It is very clear, I think, that the privilege or protection extended by the law to this class of cases [cases in defamation] must be commensurate with the liability of the party commencing or instigating the proceeding to an action for a malicious prosecution").

⁵⁶ Harper, 15 Tex L Rev at 159 (cited in note 46).

⁵⁷ Id at 157.

plimentary [sic], one terminating where another begins.⁵⁸

Underlying both rules, wrote Harper, was a policy of extensive protection of statements in judicial proceedings. This policy goes to "the very root of civilization: to encourage resort to law."⁵⁹ "In an action for defamation," he observed,

the public interest in protecting those who materially assist in the administration of the criminal law so far offsets the *interest in reputation alone*, that no action can be maintained against one who brings a formal charge of crime against another by making a sworn complaint to a magistrate upon which a prosecution is based.⁶⁰

Harper noted that because of the broad protection accorded resort to law, the action for malicious prosecution is one of the most "carefully guarded."⁶¹ But if the case for malicious prosecution is made, the plaintiff

will ordinarily be handsomely rewarded. Verdicts in actions for malicious prosecutions are notoriously liberal. This is proper, for ordinarily, several important interests have been invaded. The rigorous conditions to recovery demonstrate the outrageous character of the defendant's conduct and therefore justify punitive as well as compensatory damages.⁶²

Thus, once a judicial proceeding commences, society's interest in encouraging resort to law counterbalances the individual's interest in protecting his reputation, and the action for defamation drops out. Injury to reputation, in the judgment of the common law courts, is too light a harm to warrant the apprehension it might cause witnesses in judicial proceedings. At the moment defamation exits, however, the action for malicious prosecution enters, recompensing the successful plaintiff for the reputational losses that an action for defamation would have redressed as well as for the harms arising from invasion of his physical and property interests.⁶³

⁵⁸ Id at 159.

⁵⁹ Id at 170.

⁶⁰ Id at 168 (emphasis added).

⁶¹ Id at 169. See also Newell, *Malicious Prosecution* at 21-22 (cited in note 49).

⁶² Harper, 15 Tex L Rev at 170 (cited in note 46).

⁶³ A case in the New York Court of Appeals illustrates the overlap between an action for defamation and an action for malicious prosecution. *Sheldon v Carpenter*, 4 NY App 579 (1851). Carpenter charged that he had been slandered by Sheldon, who had accused him of counterfeit with the purpose of causing his arrest. Carpenter previously had recovered for

III. THE COMMON LAW TODAY: *BRISCOE* AND ITS PROGENY

A. *Briscoe* Revisited

We have seen that at common law in 1871 the rules regarding witness immunity and malicious prosecution were discrete yet cooperative. Put simply, if a witness had done nothing more than lie at a trial or hearing, he was "privileged" from suit; his participation in the judicial process shielded him. If the witness had initiated or encouraged the prosecution, however, he very likely would lose that protection; indeed, rather than shielding him, his participation in the judicial process would constitute the very basis of his liability. Rather than being anomalous, however, the relation between witness immunity and malicious prosecution represented a delicate balancing of individual and social interests.

Against this common law background, the enormity of the Supreme Court's error in *Briscoe* becomes clear. The common-law immunity the Court invoked protected one from suit for defamation, but not from suit for malicious prosecution. The limits of this traditional immunity are apparent from the very titles of the sources on which the Court mistakenly relied: Martin L. Newell, *Law of Defamation, Libel and Slander*; John Townshend, *A Treatise on the Wrongs Called Libel and Slander*; Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*.⁶⁴

the same statement in an action for malicious prosecution. The court held that the slander action was barred, because the action for malicious prosecution had recompensed him for the defamation as well as any other injuries suffered:

In an action for malicious prosecution, the plaintiff is entitled to recover damages not only for his unlawful arrest and imprisonment, and for the expenses of his defence [sic], but for the injury to his fame and character by reason of the false accusation. The latter, indeed, is in many cases the gravamen of the action. An accusation of crime, made under the forms of law, or on the pretence of bringing a guilty man to justice, is made in the most imposing and impressive manner, and may inflict a deeper injury upon the reputation of the party accused, than the same words uttered under any other circumstances. The most appropriate remedy for the calumny in such cases, is by the action for malicious prosecution.

Id at 580-81.

⁶⁴ 9 Colum L Rev 463 (1909). Like the other authorities the Court cited, Veeder's article discusses malicious prosecution as an alternative to the immunity-barred defamation suit, writing:

Moreover, underlying this whole doctrine of absolute immunity is the conception of an alternative remedy. . . . [F]or a criminal charge, instituted maliciously and without probable cause, an action for malicious prosecution, malicious arrest, or malicious suing out of a search warrant will lie.

Id at 470-71.

In referring to these sources, the Court merely repeated an error committed regularly by the lower courts. For example, the circuit court opinion in *Briscoe* refers the reader to Restatement (Second) of Torts § 588 (Tent Draft No 20, 1974). *Briscoe v LaHue*, 663 F2d

Was *Briscoe* wrong? Did it jumble the common law while transposing it to the modern context? The decision certainly is ambiguous. By focusing on the Supreme Court's own statement of the question presented, on *Briscoe*'s footnote nine,⁶⁵ and on the cases and authorities the Court cites, one can extract from the decision a holding that largely corresponds with common-law witness immunity. That holding is this, and no more: A § 1983 suit will not lie against a police officer based solely on false testimony he gave at a criminal trial.

This construction is tenable, and takes no greater liberties with *Briscoe* than the Court routinely takes with its own prior opinions. It is a construction, however, that knowingly avoids the general thrust of the *Briscoe* decision. That thrust—derived from the facts of the case, the lower court decision that the Supreme Court affirmed, and the circuit split it professed to resolve—suggests that in *Briscoe*, important aspects of the common law were lost.

Briscoe's facts defy categorizing the case as one solely involving false trial testimony. Officer LaHue was accused of lying not just at trial, but at two probable cause hearings.⁶⁶ At common law this would have supported a suit for malicious prosecution, and in a common-law court LaHue would have found no refuge in the immunity for defamation in judicial proceedings. Faced with these facts, however, and with a direct charge of malicious prosecution, the Seventh Circuit spoke broadly of a common-law immunity in "judicial proceedings."⁶⁷

So in the circuit court at least, *Briscoe* was decided on the wrong line of authority. One might argue that the Supreme Court essentially decided a different case when it limited its review to the question of "perjured testimony" in a "criminal trial."⁶⁸ The Court was concerned with establishing a precedent, not settling a particular dispute, the explanation would run, and it tailored the dispute to its larger purpose. Yet even this gloss does not rescue *Briscoe*, because the decision was overbroad for the circuit split it purported to mend.

713, 718 (7th Cir 1981). That section, it turns out, appears in the chapter titled: "Defenses to Actions for Defamation."

⁶⁵ Footnote nine states that the Court's decision addresses "liability for false testimony during a state-court criminal trial." *Briscoe*, 460 US at 331.

⁶⁶ See text at notes 12-13.

⁶⁷ *Briscoe*, 663 F2d at 715. The Seventh Circuit also referred to the "judicial process." See id at 720-21.

⁶⁸ See *Briscoe*, 460 US at 326 and text at notes 15-16.

At least one circuit court decision cited in *Briscoe* as establishing a "rule of absolute witness immunity" had granted immunity where the complaint clearly made out a case for malicious prosecution. The plaintiff in *Charles v Wade*⁶⁹ spent more than three and a half years in prison for murder before new evidence cleared him of the crime. Once released from jail, plaintiff Charles filed an action alleging that Wade, the prosecuting officer, had withheld evidence, falsified eyewitness accounts, persuaded another witness to testify falsely, and perjured himself, thereby instigating a false imprisonment, malicious arrest, and malicious prosecution violative of the plaintiff's rights under the Sixth and Fourteenth Amendments. In the face of this powerful and explicit charge of malicious prosecution, the Fifth Circuit conferred witness immunity on Wade, giving many of the reasons and making many of the mistakes that the Supreme Court would later repeat in *Briscoe*. Harper and James's discussion of the law of defamation, so irrelevant to the charge at hand, figures prominently in the court's opinion.⁷⁰

Briscoe's confusion of malicious prosecution with defamation generates uncertainties extending far beyond the mistaken conferral of immunity upon a lying witness. After *Briscoe*, the lower courts' dilemma is this: The Supreme Court indicated in *Briscoe* that it was extending a broad common-law immunity to the mere surface of contemporary judicial proceedings; police officers would be immune from all § 1983 claims arising from false testimony, but not necessarily testimony given anywhere but at trial. The common-law immunity that the Court invoked for its decision, however, was not broad at all; it was specific, narrow, and limited, applying only to actions for "words spoken." Of even greater significance, that immunity—so far as it went—was not superficial but surprisingly deep, penetrating to the very initiation of judicial proceedings. Courts today must decide whether to adopt the broad immunity suggested in *Briscoe*, or the narrower immunity recognized at common law. Will they apply the common-law rule as the Supreme Court described it, or as it really was? The courts' disposition of these issues has important ramifications for the liability of police officers conducting criminal investigations.

⁶⁹ 665 F2d 661 (5th Cir 1982).

⁷⁰ *Id* at 666.

B. Lower Court Applications of *Briscoe*

To date, nearly every circuit court to consider the issue has read *Briscoe* as establishing a broad immunity. These courts have understood the decision as granting police trial witnesses absolute immunity from *any* § 1983 action related to their testimony. This broad construction of the case is apparent in their very summaries of *Briscoe*'s holding. The Ninth Circuit, for example, has explained that

[in *Briscoe*] the Court [] held that a convicted defendant could not state a claim for damages under 42 U.S.C. 1983 (1982) against a police officer who had allegedly given perjurious testimony during the trial⁷¹

Such statements by the circuit courts reflect an important transformation. At common law, witness immunity was a creature of the law of defamation; today, under § 1983, witness immunity is seen as an aspect of trial testimony. In a sense, the law has undergone two changes: the distinction between the actions of malicious prosecution and defamation has been blurred, and a new distinction between trial and pretrial proceedings has been created.

By the first change—the blurring of common-law actions—the Court has immunized acts that once would have invited suit for malicious prosecution. The ill effects of this first change seem to be confined by the second: immunity is broader, true, but is it as deep? After all, in recognizing the broader immunity in *Briscoe*, the Court expressly reserved the question of its applicability to pretrial proceedings. Thus, the breadth of immunity was expanded to cover all actions, but its depth was called into question. Unfortunately, however, to a court familiar with the origins and rationale of the witness immunity from which *Briscoe* immunity was cut, the depth of *Briscoe* immunity is no mystery either. As demonstrated above, witness immunity from suit for defamation ex-

⁷¹ *Holt v Castaneda*, 832 F2d 123, 124 (9th Cir 1987). But see note 100 for discussion of a more recent Ninth Circuit case. The Second Circuit explained at one point that since *Briscoe*,

law enforcement officers are entitled to absolute immunity from liability in actions under 42 U.S.C. § 1983 (1982) for monetary damages resulting from the officer's testimony at criminal trials.

Daloia v Rose, 849 F2d 74, 75 (2d Cir 1988). That circuit has since completely rethought its treatment of police witness immunity. See text at notes 95-99.

The Sixth Circuit has opined that "witnesses in judicial proceedings are absolutely immune from civil liability under 42 U.S.C. § 1983 based on their testimony" *Macko v Byron*, 760 F2d 95, 97 (6th Cir 1985).

tended to the actual commencement of the legal proceedings. And *Briscoe* invokes that same witness immunity. It follows that *Briscoe* immunity also extends to the commencement of criminal proceedings. This is indeed the route that a significant block of the circuits has followed.

A striking example of § 1983 witness immunity after *Briscoe* is *Wickstrom v Ebert*.⁷² Plaintiff Wickstrom accused defendant Harker, a special agent in Wisconsin's Department of Justice, of having "conspired to commit perjury upon signing . . . [a] Criminal Complaint [against plaintiffs Wickstrom and Minniecheske]." ⁷³ The complaint alleged deprivation of constitutional rights, as any action under § 1983 must, but the clear common-law analogue is the action for malicious prosecution; the paradigmatic act of "initiating" a criminal prosecution is signing a criminal complaint. Nonetheless, in *Wickstrom* the court concentrated exclusively on the common-law immunity in the law of defamation. It quoted copiously from *Briscoe* on the need to protect witnesses from liability; it included a long excerpt⁷⁴ on the value of witness immunity to the criminal system as a whole; and it buttressed its decision to deny "a civil remedy against the dishonest witness" with Prosser's observation that such immunity is "simply part of the price that is paid for witnesses who are free from intimidation by the possibility of civil liability for what they say."⁷⁵ This quotation, as one might suspect, came from a section of Prosser entitled "Defamation, Absolute Privilege."⁷⁶ The *Wickstrom* court went on to observe that the "doctrine of witness immunity finds classic application under the circumstances of the present case."⁷⁷ It concluded:

Although the specific allegations against this defendant are not based on testimony he may have given during the course of plaintiffs' trial itself, the Court nonetheless concludes that the immunity guaranteed witnesses, as described above, applies during any stage in the judicial process at which an individual might be called upon to testify, including the initiation of a criminal prosecution.⁷⁸

⁷² 585 F Supp 924 (E D Wis 1984).

⁷³ Id at 934, quoting plaintiffs' complaint.

⁷⁴ Id at 933, quoting *Charles v Wade*, 665 F2d at 666-67 (discussed at notes 69-70).

⁷⁵ Id, quoting William L. Prosser, *The Law of Torts* § 114 at 778 (West, 4th ed 1971).

⁷⁶ Prosser, *The Law of Torts* at 776.

⁷⁷ *Wickstrom*, 585 F Supp at 933.

⁷⁸ Id at 934.

To a great extent the court in *Wickstrom* was exactly right. A criminal complaint did indeed entail a "classic application" of the rule of absolute immunity from suit for defamation. Where the court erred, of course, was in considering liability for defamation instead of liability for malicious prosecution. Filing a criminal complaint entails a "classic application" of liability for malicious prosecution just as surely as it entails a "classic application" of immunity from suit for defamation. But in making this mistake, the court merely repeated an error that the Supreme Court had made—and hence sanctioned—just a year before in *Briscoe*.

Other courts have been true to *Briscoe* in the same fashion. They have realized that the traditional immunity discussed in *Briscoe* is not limited to trial witnesses, and that the policy concerns that make the rule applicable to trials make it applicable to earlier proceedings as well. In *Williams v Hepting*,⁷⁹ for example, the Third Circuit found *Briscoe* immunity applicable to preliminary hearings. Interestingly, *Williams* quoted the same Harper and James passage on defamation immunity cited in *Wickstrom*.⁸⁰ The D.C. Circuit considered immunity for grand jury witnesses in *Briggs v Goodwin*.⁸¹ Just before *Briscoe* was decided the Circuit had rejected § 1983 witness immunity in the very same case; after remand on a separate issue, the court reconsidered immunity in light of the high court's recent pronouncement:

Briscoe emphasized the concern that the absence of immunity would interfere with the ability of "judicial proceedings" "to determine where the truth lies." That concern applies not only to trials, but to any judicial proceeding where the testimony of witnesses might be affected by the lack of immunity. Thus, the rationale of *Briscoe* applies with equal force wherever a witness testifies in a judicial proceeding the function of which is to ascertain factual information.⁸²

There are courts that have declined to extend the immunity identified in *Briscoe* to earlier criminal proceedings. But by and large, these decisions are even more disappointing than those finding immunity: instead of following *Briscoe*'s mistaken reasoning, they contain almost no reasoning at all. In *Wheeler v Cosden Oil*,⁸³

⁷⁹ 844 F2d 138, 143 (3d Cir 1988).

⁸⁰ Id at 141.

⁸¹ 712 F2d 1444 (DC Cir 1983).

⁸² Id at 1448-49. See also *Macko v Byron*, 760 F2d 95 (6th Cir 1985).

⁸³ 734 F2d 254 (5th Cir 1984).

for example, the Fifth Circuit based its decision that absolute immunity did not extend to probable cause hearings on the fact that the Court had expressly reserved the question in *Briscoe*. "*Briscoe* does not create immunity where none existed before,"⁸⁴ the court wrote, not troubling to inquire whether an immunity for witnesses in probable cause hearings had in fact existed before. The only authority the court cites for its position is—of all things—Justice Marshall's dissent in *Briscoe*. Likewise, when the Tenth Circuit took up the question of immunity for grand jury testimony in *Anthony v Baker*,⁸⁵ it justified its denial of immunity on the mere fact, again, that the question had been reserved in *Briscoe*. Most notably, neither court based its perceived limitation of *Briscoe* on the different rules that attended the actions for defamation and malicious prosecution.

IV. *MALLEY v BRIGGS* AND THE "COMPLAINING WITNESS"

In the annals of § 1983 immunity, *Briscoe v LaHue* is not known solely or even chiefly for what it said about witness immunity and the police. The decision also has received attention as the one in which the Court determined § 1983 immunity on the basis of "functional categories," with only passing consideration of the policy implications of immunity given the "status of the defendant."⁸⁶ It was LaHue's "function" as a witness, not his "status" as a police officer that dictated the Court's decision. Against a barrage of arguments advanced by the plaintiff,⁸⁷ the Court persisted in treating police officers like lay witnesses.

Briscoe, however, is not the Court's last word on the functional category of "witness." Consequently, it is not the Court's last word on police witness immunity. Indeed, in this area of the law, *Briscoe* eventually may be eclipsed by a passing reference to witnesses in the subsequent decision, *Malley v Briggs*.⁸⁸

Malley, a state trooper, had arrested James and Louisa Briggs on a warrant he had obtained on evidence furnishing appreciably less than probable cause. In the § 1983 suit that followed, Malley pleaded absolute immunity because "his function in seeking an ar-

⁸⁴ Id at 261.

⁸⁵ 767 F2d 657, 663 (10th Cir 1985).

⁸⁶ See, for example, Note, *Tort Immunity—Briscoe v. LaHue: Abandonment of the Balancing Approach in Immunity Cases Under Section 1983*, 62 NC L Rev 584, 584-85 (1984) ("In a recent decision, however, the Court brought the continuing validity of this balancing approach into question by adopting a strict functional test.").

⁸⁷ See note 24 and accompanying text.

⁸⁸ 475 US 335 (1986).

rest warrant was similar to that of a complaining witness.”⁸⁹ The Court responded:

The difficulty with this submission is that complaining witnesses were not absolutely immune at common law. In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause. Given malice and the lack of probable cause, the complainant enjoyed no immunity.⁹⁰

The Court cited several nineteenth-century authorities to the effect that a “complaining witness” may be liable for initiating a criminal prosecution with malice and without probable cause.⁹¹ The authorities—mostly cases—were all straightforward actions for malicious prosecution. This passage would hardly be notable were it not that the Court had seemed so determined to ignore the action for malicious prosecution in *Briscoe*. What makes the passage particularly portentous, however, is the introduction of the term “complaining witness.” The expression had currency in the nineteenth century—and does today—as designating the witness who initiates the prosecution of another: the complainant or prosecutor of record. But the term itself appears in none of the cases cited by the Court.⁹² As used in *Malley*, the term takes on import well beyond its common-law meaning, signifying a new “functional category” with regard to § 1983 immunity.

The Court is correct in stating that complaining witnesses were not immune from suit at common law; they could be sued for malicious prosecution. But so could “regular” witnesses. Any action against a regular witness would fail, to be sure, but it would fail because it lacked an essential element of the offense—initiation of the prosecution—not because the witness had

⁸⁹ Id at 340.

⁹⁰ Id at 340-41.

⁹¹ Id at 341 n 3.

⁹² All these authorities did, however, contain either the term “complainant” or “prosecutor.” *Bell v Keepers*, 37 Kan 64, 14 P 542, 542 (1887); *Finn v Frink*, 84 Me 261, 24 A 851, 852 (1892); *Dinsman v Wilkes*, 53 US (12 How) 390, 402 (1851); William Wait, 4 *Actions and Defenses* 357 (Gould, 1885). The Court’s declination of these terms in favor of the less common “complaining witness” signifies further its desire for a clear functional counterpart to the immune “witness.” See text at note 94. Note, however, that adopting the term “prosecutor” to denominate the *liable* complaining witness would have underscored the paradox inherent in the existence of liability for private prosecutors but absolute immunity for public prosecutors. *Imbler v Pachtman*, 424 US 409 (1976). The distinction did exist at common law, however, and *Imbler* must be regarded as resting at least partially on the defendant’s “status” as public prosecutor.

a grant of immunity. To put it another way, complaining witnesses had immunity from defamation suits to the same extent as the witnesses addressed in *Briscoe*:⁹³ neither could be made to answer in defamation for words spoken in a judicial proceeding.

In this sense, then, *Malley*'s discussion of complaining witnesses is a feint. The Court was not awaking to a different type of witness (the "complaining witness") so much as recognizing a different cause of action—the action for malicious prosecution. That the Justices chose to express the "new" cause of action in terms of witness "categories," however, assumes great importance when we recall that after *Briscoe*, § 1983 immunity rests on the notion of "functional categories."⁹⁴ Seen in this light, it becomes apparent that the Court in *Malley* quietly but effectively introduced a new functional category: the complaining witness, who (in the Court's specially-tailored history) was liable at common law and so is liable under § 1983. Put simply, *Malley* is Supreme Court authority for bringing § 1983 witness immunity back in line with its common-law antecedents.

The Second Circuit recognized as much in *White v Frank*.⁹⁵ The facts in *White* illustrate the intolerable extremes that absolute witness immunity from § 1983 would permit. In *White*, Poughkeepsie police officers Frank and Marshall had testified before a grand jury and again at trial that they had seen plaintiff White sell cocaine. White was convicted. The two officers subsequently were implicated in an investigation of corruption in the Poughkeepsie police department; Frank admitted perjuring himself in White's prosecution. After nearly two years in prison, White was freed and sued the two officers under § 1983 for false arrest, false imprisonment, and malicious prosecution.

The Second Circuit approached its decision with a general statement of § 1983 immunity: The statute admits no immunity on its face but those "well grounded in history and reason" have perjured.⁹⁶ The court continued:

The common law made a subtle but crucial distinction between two categories of witnesses with respect to their immunity for false testimony. Those whose role was limited to pro-

⁹³ Recall that in *Briscoe* and at least one of the cases forming the circuit split *Briscoe* purported to resolve, the defendants had in fact been sufficiently involved in initiating the prosecution that they would qualify as complaining witnesses.

⁹⁴ See text at note 25.

⁹⁵ 855 F2d 956 (2d Cir 1988).

⁹⁶ *Id* at 958, citing *Imbler v Pachtman*, 424 US 409, 417-18 (1976).

viding testimony enjoyed immunity; those who played a role in initiating a prosecution—complaining witnesses—did not enjoy immunity. The distinction reflected the difference between the two causes of action by which those falsely accused sought to hold witnesses liable. In an action for defamation, the perjurious witness was sought to be held liable only for the defamatory effect of his testimony, and in such an action he enjoyed absolute immunity upon a threshold showing that the allegedly defamatory statements were relevant to the judicial proceeding. . . . This immunity applied to grand jury as well as trial testimony.⁹⁷

As should be clear by now, this is an accurate restatement of the common law regarding defamation. The court continued:

However, in an action for malicious prosecution, the complaining witness was sought to be held liable for his role in *initiating* a baseless prosecution, and “complaining witnesses were not absolutely immune at common law”⁹⁸

With this quotation the court introduced the action for malicious prosecution and, after surveying the common law, it concluded:

Where [] the constitutional tort is the action of a police officer in initiating a baseless prosecution, his role as a “complaining witness” renders him liable to the victim under Section 1983, just as it did at common law, and the fact that his testimony at a judicial proceeding may have been the means by which he initiated the prosecution does not permit him to transpose the immunity available for defamation as a defense to malicious prosecution.⁹⁹

White is an impressive opinion. It is refreshing, the first informed discussion of witness immunity after a string of cases misstating the pertinent common law. It is deft, dodging a mistaken Supreme Court case decided on quite similar facts by identifying

⁹⁷ *White*, 855 F2d at 958-59.

⁹⁸ *Id* at 959 (emphasis in original), citing *Malley*, 475 US at 340.

⁹⁹ *White*, 855 F2d at 961. In its opinion, the court gently admonished its fellow circuits. After stating that the common law provided witnesses absolute immunity from suit for defamation, it noted that numerous other courts have granted absolute immunity from § 1983 suits to witnesses who had testified falsely. However, the court observed, “the decisions have not been careful to recognize that such immunity is available only where the constitutional tort is simply giving false testimony.” *Id* at 961. The court thus broke from the path that had been followed by other courts—and by the Second Circuit itself in a decision merely two months before. See *Daloia v Rose*, 849 F2d 74 (2d Cir 1988).

and leaping aboard a more recent Supreme Court case that was only vaguely bound in the right direction. Most important, the *White* court looked not at the nature of the proceeding, but at the role of the officer in the criminal prosecution as a whole. Put simply, *Malley v Briggs* furnishes the means by which lower courts can adjust for the error made by the Supreme Court in *Briscoe*. *White v Frank* shows how it is done.¹⁰⁰

V. CONCLUSION: POLICY IMPLICATIONS OF *MALLEY* AND *BRISCOE*

This Comment has aimed to guide lower courts' understanding of the Supreme Court's recent rulings on § 1983 police witness immunity. It has accepted uncritically the Supreme Court's premises—notably its adherence to an “historical” approach to § 1983 immunities—though in the course of things it has illustrated a considerable weakness of the approach: its inexactness forming law. Given this clumsiness in producing law, we should not be surprised to discover that the historical approach is also an inexact manner of producing *policy*. The question whether the product of *Briscoe* and *Malley* does in fact deliver the optimal amount of federal liability for abrogation of constitutional rights, or whether that product fits intelligently with the Court's other decisions on § 1983 immunity, lies beyond the scope of this Comment. Nonetheless, the changes that *Malley* works on *Briscoe*, and that the two work on § 1983 immunities, merit some brief attention here.

In *Briscoe* the Court decided the question of police witness liability by transposing the common law's treatment of lay witnesses in 1871, the year § 1983 was drafted. Nothing compelled the Court to treat police officers like lay witnesses. It admitted as much in *Briscoe* when, after setting forth its historical argument for immunity, it observed that, alternatively, a policeman may be regarded not as “any other witness” but “as an official performing a critical role in the judicial process, in which event he may seek the benefit afforded to other governmental participants in the same proceeding.”¹⁰¹

This is an intriguing and potentially significant suggestion,

¹⁰⁰ The Ninth Circuit recently took notice of *Malley's* qualification of *Briscoe* in *Burns v County of King*, 883 F2d 819, 822 (9th Cir 1989). The plaintiff sought recovery for damages allegedly caused by an affidavit filed in a post-trial bond hearing. The court held, correctly, that the kind of immunity invoked in *Briscoe* applied to affidavits as well, and parried the plaintiff's reference to *Malley* by observing, also correctly, that statements in post-trial proceedings are “not analogous to [those] of a complaining witness who procures the issuance of an arrest warrant.”

¹⁰¹ *Briscoe*, 460 US at 335-36 (emphasis added).

since it reaches toward the absolute immunity that the Court afforded prosecutors in *Imbler v Pachtman*.¹⁰² The Court did not employ this alternative in *Briscoe*, but it held it out and left it open. In *Malley* that alternative was closed, as the Court wrote in response to the defendant's plea for a special police witness immunity:

We have interpreted § 1983 to give absolute immunity to functions 'intimately associated with the *judicial* phase of the criminal process' . . . [An] officer applying for a warrant . . . , while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment.¹⁰³

Thus, in denying absolute immunity to police witnesses, the *Malley* Court granted that officers may perform acts—that is, have “functions”—that bring them within the absolute immunity surrounding judicial proceedings, but maintained that unlike judges and prosecutors, police officers are not so integral to the judicial process that their job alone imports absolute immunity.

For all its inaccuracy, *Briscoe v LaHue* was guided by a sound instinct for the legal insulation necessary to effective police enforcement. The Court reasoned that if it allowed an action under § 1983 against police officers based on their testimony, their “contribution to the judicial process” and the “effective performance of their other public duties” would be undermined. Thus even the threat of frequent lawsuits “might well impose significant burdens on the judicial system and on law enforcement resources.” The Court invoked *Imbler* in noting its hesitancy to allow such a burden to divert police officers’ “energy and attention . . . from the pressing duty of enforcing the criminal law.”¹⁰⁴

In retreating from the protections of *Imbler*, did *Malley* also retreat from the protection of the concerns expressed in *Briscoe*? One could characterize *Malley* as irresponsibly lumping the fate of police witnesses with whatever happened to be the lot of private

¹⁰² 424 US 409 (1976).

¹⁰³ *Malley*, 475 US at 342-43 (citation omitted; emphasis in original). The Court did not elaborate on this rather summary observation. Nor did it acknowledge the institutional constraints that could deter police misconduct even in the absence of civil redress, but that obviously do not exist to constrain private complainants. On the contrary, citing *Imbler*'s reference to the bar's ability to control prosecutorial misconduct, the Court observed that “[t]he absence of a comparably well-developed and pervasive mechanism for controlling police misconduct weighs against allowing absolute immunity for the officer.” *Id.* at 343 n 5.

¹⁰⁴ *Briscoe*, 460 US at 343-44, quoting *Imbler*, 424 US at 425.

citizens at common law. Police witnesses, it may be objected, are not just any other witnesses. Because part of a police officer's job is to identify crime and apprehend suspects, in many cases where his testimony is questioned his "function" will have been that of complaining witness; that is, his involvement will extend early enough in the prosecution that at common law he would have been open to an action for malicious prosecution. Almost by definition, then, the "status" of police officer entails the "function" of complaining witness. And in this sense, the Supreme Court has adopted a "functional category" that accomplishes a definitional designation of police officers as parties open to § 1983 suit for malicious prosecution. After *Imbler*, prosecutors were designated as "immune"; after *Malley*, it might be said, police officers—as complaining witnesses—are dubbed "liable."

As threatening a prospect as this may seem, one must remember that at common law the complaining witness was liable in the same sense; the action to which he was liable, however—malicious prosecution—was tempered by the same considerations that the Court expressed in *Briscoe*, and that concern us today. As has been shown, the common law's insulation of witnesses did not end with absolute immunity; the action for malicious prosecution shielded "complaining witnesses" while rendering them liable as well. Its burdensome elements were meant to throw enough obstacles in the path of prospective plaintiffs that individuals honestly intent on reporting crime would have little reason to fear their own liability.

Thus, subjecting police officers to suit for statements made in judicial proceedings does not necessarily deter them from effectively performing their jobs. Potentially, it merely handles police liability with the same solicitude for public and private interests expressed by the early common-law courts, and evinced by the Supreme Court in *Briscoe*.

For this very reason, however—because the common law was so carefully calibrated to address the concerns voiced in *Briscoe*—it is important that as courts develop police witness liability for statements in judicial proceedings they remain mindful of the common law antecedents. In *Malley* the Court has provided the framework for adhering to the common law roots but, because of the awkward position it had placed the law (and itself) in, it has not made that framework explicit.

As we have seen, prior to *Malley* the Supreme Court had held that anyone—layman or policeman—who met the functional category "witness" was absolutely immune from suit under § 1983. Trooper Malley was a witness in a sense—he was a witness in the

very important sense that the kind of immunity invoked in *Briscoe* covered him as surely as it covered a witness at trial. Thus, to distinguish Malley's role from that of Officer LaHue in *Briscoe*—to find liability in *Malley* where *Briscoe* had not—the Court needed to place Malley in a different functional category, one not carrying immunity. Recognizing a different *action* would not do: *Briscoe* had made clear that it was functional categories that determined immunity, and had spoken broadly in terms of immunity from all actions. And so, in rough correspondence with the common law, the functional category “complaining witness” was recognized.¹⁰⁵ In short, the indirect way in which the Court defined this area of the law prevented it from explicitly referring to the common law distinction between suits for defamation, where absolute immunity obtains, and suits for malicious prosecution, where liability exists. But this is essentially the distinction the Court has settled upon. Happily, it is a distinction developed over centuries at common law with an eye to balancing law enforcement with individual liberty.¹⁰⁶

Some will contend that the Court should depart from these common-law antecedents in addressing the new constitutional torts created in 1871: these are changed times and we are, after all, dealing with injuries on a constitutional scale. This is an argument for another day, but one worth hearing. In considering arguments for more radical departures from common law immunities, however, courts and commentators should bear in mind that in addition to providing a generally valuable constraint on judicial invention, an historical approach to § 1983 immunities draws on a tradition that has already weighed, over centuries, the public and private interests that the Court and its critics seek to balance today.

¹⁰⁵ As noted above, the Court seems to have settled on the term “complaining witness” precisely for its correspondence to the term denominating the immune “witness,” thereby underscoring the relations of the two categories. See text and notes at notes 91-94.

¹⁰⁶ Recall that striking a balance between encouraging truthful reports of crime and discouraging false ones has been a concern of the Anglo-American legal tradition since before the Conquest. See note 43 and accompanying text, citing Percy Henry Winfield, *The History of Conspiracy and Abuse of Legal Procedure*.

